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**IN THE
COURT OF APPEALS OF INDIANA**

BIRT FORD, JR.,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 02A03-0510-CR-510

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Robert J. Schmoll, Judge
Cause No. 02D04-0506-FA-32

November 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Birt Ford appeals his convictions following a jury trial of one count each of criminal deviate conduct and rape, both Class A felonies, one count each of burglary and criminal confinement, both Class B felonies, and one count of invasion of privacy, a Class A misdemeanor. Ford also seeks review of his aggregate seventy-year sentence. Ford first raises the issue of whether the trial court properly admitted evidence concerning two prior incidents between Ford and the victim, Yolanda Ford. Ford then raises the issue of whether his sentence is inappropriate. We hold that the court properly admitted the evidence of the prior incidents and that Ford's sentence is appropriate, given his character and the nature of the offense. We affirm.

Facts and Procedural History

The facts most favorable to the verdict show that as of June 2005, Ford and Yolanda had been involved in a relationship for roughly twenty years and had been married for ten years. Ford and Yolanda have four children, the oldest being Laressa Ford, who was seventeen at the time of the trial. Ford and Yolanda's relationship was not always peaceful. In January 2005, a police officer was dispatched to the couple's residence to assist Yolanda with the removal of some of her items. At some point Ford told the officer, "I could do something to my wife while you are here in a nanosecond and there isn't anything you could do."¹ Transcript at 238. On May 27, 2005, Yolanda obtained a protective order against Ford,

¹ The officer who testified at trial did not put this statement in context. Ford explained at his sentencing hearing that this statement was not meant to be threatening: "The statement I made was clearly,

prohibiting Ford from contacting Yolanda or from visiting Yolanda's residence. Despite this order, Ford continued to contact Yolanda. On May 30, Ford called Yolanda several times, attempting to convince her to attend a barbeque with him. Yolanda instead went to her cousin's residence. Ford arrived at the cousin's house and used force in an attempt to get Yolanda to leave with him, in the process giving Yolanda visible injuries to her arms and stomach. Yolanda's mother and a police officer, whom Yolanda's cousin had called, photographed the injuries. After this incident, Yolanda and her four children returned to a women's shelter where they had been residing.

On June 11, 2005, Yolanda and her children returned to the residence that she rented from the housing authority, which had imposed a no-trespassing order on Ford. That same day, Ford called Yolanda and asked her to go to church with him. That night, Yolanda put three of her children to bed and fell asleep watching television with Laressa. Yolanda awoke when Ford kicked in the back door. Yolanda attempted to call 911, but Ford grabbed the phone from her, removed the battery, and threw the phone to the floor. Ford then placed a kitchen table in front of the back door and retrieved a butcher's knife from the kitchen. Ford told Yolanda to go into the back room with him, which she did after some hesitation. Upon entering the back room, Ford locked the door and told Yolanda that if the police arrived he would kill her and "have the police kill him." Tr. at 163. Ford, while still holding the knife, told Yolanda to perform oral sex, which Yolanda did. Ford then took Yolanda into the bathroom, at which point they heard sirens and Ford repeated his threat to kill Yolanda if

you guys didn't have to come, I love my wife and I would never harm her. Besides, if a person wanted to hurt

police entered the house. Ford called to Laressa, who told Ford that there was a fire across the street. After Ford entered the front room to check for himself, he told Laressa that if police entered the house, “both her parents [would] be dead.” Tr. at 168. Ford then returned to the bedroom with Yolanda, put the knife on the nightstand and told Yolanda to remove her clothes. Ford then had sex with Yolanda, during which Yolanda told Ford that she felt violated. Ford and Yolanda then went to bed. Yolanda testified that she did not get out of bed because she was afraid that if she did, she would awake Ford. In the morning, Ford again had sex with Yolanda. While Ford was in the shower, Yolanda’s mother came to the house, and Yolanda left with her and the four children. After they had driven away from the residence, Yolanda called the police and was then taken to a sexual assault treatment center. The nurse who examined Yolanda found injuries consistent with forced penetration.

At trial, the State’s evidence included the testimony of Yolanda, Laressa, and the nurse who treated Yolanda, and a taped police interview with Ford, corroborating the majority of Yolanda and Laressa’s testimony. Over Ford’s objection, the State also introduced evidence of the incidents that occurred in January and May.

At the sentencing hearing, the trial court found the following aggravating circumstances: (1) Ford’s criminal history consisting of one felony, criminal recklessness, and two misdemeanors, battery and public intoxication; (2) Laressa, a minor, witnessed part of the offense; (3) Ford confined Yolanda for over ten hours; and (4) Ford violated a no-contact order. The trial court found no mitigating circumstances and sentenced Ford to: (1)

someone, it would only take a second for them to do so.” Sentencing Transcript at 9.

thirty years for criminal deviate conduct; (2) thirty years for rape; (3) ten years for burglary; (4) ten years for criminal confinement; and (5) one year for invasion of privacy. The felony sentences conform to the advisory sentences identified by statute. Ind. Code §§ 35-50-2-4 (thirty years for A felonies); 35-50-2-5 (ten years for B felonies). Because of the aggravating circumstances, the trial court ordered that the sentences for criminal deviate conduct, rape, and criminal confinement run consecutively, resulting in an aggregate sentence of seventy years. Ford appeals his conviction and seeks review of his sentence.

Discussion and Decision

I. Admission of Evidence

A. Standard of Review

We review a trial court's admission of evidence only for abuse of discretion. Samaniego-Hernandez v. State, 839 N.E.2d 798, 802 (Ind. Ct. App. 2005). We will find that a trial court has abused its discretion when its "decision is clearly against the logic and effect of the facts and circumstances before it." Id. Even if we find that the trial court abused its discretion in admitting evidence, we will not reverse unless the defendant's substantial rights have been affected. Ind. Evidence Rule 103(a); Pruitt v. State, 834 N.E.2d 90, 117 (Ind. 2005), cert. denied, 126 S.Ct. 2936 (2006). In determining whether or not a party's substantial rights were affected, we "assess the probable impact of the evidence upon the jury." Schmid v. State, 804 N.E.2d 174, 181 (Ind. Ct. App. 2004), trans. denied.

B. Admission of Prior Acts Under Rule 404(b)

Ford argues that the only relevant purpose for introducing evidence of the January and

May incidents is to show that Ford acted in conformity with those actions during the June 11 incident, and thus, the evidence should have been excluded under Indiana Evidence Rule 404(b).² We disagree.

Rule 404(b) seeks to protect defendants from being convicted based on the “forbidden inference” that in their present case they acted in conformity with past actions. Hicks v. State, 690 N.E.2d 215, 219 (Ind. 1997). Evidence of a defendant’s prior bad acts is inadmissible if it is offered solely to produce this forbidden inference. Bryant v. State, 802 N.E.2d 486, 499 (Ind. Ct. App. 2004), trans. denied. Such evidence is admissible only if it is relevant to some other issue and its probative value is not substantially outweighed by the danger of unfair prejudice. Id.

Anytime the State seeks to introduce evidence of a defendant’s prior bad acts, it runs the risk of presenting the evidence in a manner that raises the forbidden inference. Therefore, in determining whether or not evidence was introduced for the purpose of showing a defendant’s propensity to commit criminal acts, we examine the manner in which the State used the evidence. See Camm v. State, 812 N.E.2d 1127, 1134 (Ind. Ct. App. 2004), trans. denied (evidence was inadmissible pursuant to Rule 404(b) because State introduced evidence to support its theory that “the Defendant did have a defect in his character to allow him to engage in these acts”); Pagan v. State, 809 N.E.2d 915, 925 (Ind. Ct. App. 2004),

² Rule 404(b) states: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”

trans. denied (evidence of defendant's "Pimp" tattoo was inadmissible pursuant to Rule 404(b) because "State not only pointed out [the defendant's] tattoo, but clearly tried to raise the inference of criminal or distasteful conduct on [the defendant's] part"). Whether or not evidence of a defendant's prior bad acts violates Rule 404(b) will often require a careful examination of the record, and will turn on the precise manner in which the State uses the evidence.

In this case, the State introduced evidence of the January incident through the testimony of a police officer, and evidence of the May incident through the testimony of Yolanda, the testimony of a police officer, and photographs of Yolanda's injuries sustained in the encounter. In her direct examination of Yolanda, the prosecutor asked several times whether Yolanda had said "no" to Ford during the May 30 incident, and elicited testimony that Yolanda's attempts to refuse Ford did not deter him. In her closing argument, the Prosecutor emphasized that the evidence of Ford's prior acts was introduced to show Yolanda's state of mind, not Ford's propensity. Tr. at 324 ("The prior incidents were not brought up to show he's a monster . . . those prior incidents [go] to her state of mind."); id. at 325-36 (explaining that the May 30 incident was introduced to support Yolanda's testimony that she was afraid of Ford and that "it doesn't do any good to say no"). Yolanda's state of mind is relevant in this case because Ford's defense was that because Yolanda had not struggled, she had consented to sex with Ford. The State therefore was entitled to introduce

evidence to show that Yolanda had not consented.³ Cf. Davis v. State, 598 N.E.2d 1041, 1049 (Ind. 1992), cert. denied, 510 U.S. 948 (1993) (holding that statements were not hearsay because they were not offered for the truth of the matter asserted, but to show the victim’s state of mind, which was relevant because the defendant argued that the victim had consented to the confinement and sex).

The State came precariously close to using the evidence of Ford’s prior acts to show his propensity. The evidence of the prior encounters was not the only means by which the State could have shown Yolanda’s state of mind; Yolanda’s testimony and the circumstantial evidence indicated that Yolanda was afraid of Ford during the encounter and had not consented. In particular, we question the need to have introduced photographs of Yolanda’s injuries sustained during the May 30 incident. However, in this close case, we conclude that the manner in which the State used the evidence, particularly the emphasis the State placed on the evidence’s relevance to Yolanda’s state of mind, demonstrates that the evidence was introduced for some relevant purpose other than to show Ford’s propensities and therefore did not violate Rule 404(b).

Even if evidence is not excluded by Rule 404(b), it is still subject to Indiana Evidence Rule 403, and should be excluded if its danger of unfair prejudice substantially outweighs its probative value. See Dickens v. State, 754 N.E.2d 1, 4 (Ind. 2001). However, “evidence admitted in violation of [Rule 403] will not require a conviction to be reversed ‘if its

³ The State was also required to show that Yolanda had not consented in order to satisfy the elements of criminal confinement. Ind. Code § 35-42-3-3 (“A person who knowingly or intentionally . . . confines another person without the other person’s consent . . . commits criminal confinement”).

probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect a party's substantial rights.’” Houser v. State, 823 N.E.2d 693, 698 (Ind. 2005) (quoting Bassett v. State, 795 N.E.2d 1050, 1054 (Ind. 2003)). In this case, we do not reach the Rule 403 analysis because we conclude that any error in the admission of the evidence did not affect Ford’s substantial rights and therefore constitutes harmless error. Yolanda’s testimony, Laressa’s testimony, and Ford’s taped interview all indicate that Ford broke into Yolanda’s house in violation of a protective order, blocked the doors to the house with furniture, and throughout the encounter either carried or kept within his immediate control a butcher’s knife. In light of this evidence and the prosecution’s characterization of the purpose of the evidence relative to the prior incidents, we hold that the admission of evidence relating to the two prior incidents did not affect Ford’s substantial rights. Therefore, even if the evidence might have been excluded under Rule 403, any error was harmless.

II. Sentencing

A. Standard of Review

When reviewing a sentence imposed by the trial court, we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Ind. Appellate Rule 7(b). Under this rule, we have authority to “revise sentences when certain broad conditions are satisfied.” Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005).

B. The Appropriateness of Ford's Seventy-Year Sentence

In ordering Ford to serve consecutive sentences for his criminal deviate conduct, rape, and criminal confinement convictions, the trial court found four aggravating circumstances and no mitigating circumstances. The aggravating circumstances of Ford's prior criminal history, the presence of Laressa, a minor, during the incident, and the violation of the protective order are specifically authorized by statute. Ind. Code § 35-38-1-7.1. The length of the criminal confinement relates to the nature and gravity of the offense, also a permissible consideration. See Scott v. State, 840 N.E.2d 376, 382 (Ind. Ct. App. 2006), trans. denied (the "particularized circumstances of the offense" may constitute an aggravating circumstance).

"A single aggravating factor may support the imposition of both an enhanced and consecutive sentence." Field v. State, 843 N.E.2d 1008, 1010-11 (Ind. Ct. App. 2006), trans. denied. However, even when it is undisputed that an aggravating circumstance exists,⁴ we still have an "obligation to consider what weight to assign a particular aggravator and to balance the aggravators and mitigators." Trusley v. State, 829 N.E.2d 923, 927 (Ind. 2005).

Ford notes some factual similarities between this case and Walker v. State, 747 N.E.2d 536 (Ind. 2001), in which our supreme court found an aggregate eighty-year sentence for two counts of child molesting to be manifestly unreasonable.⁵ In Walker, the defendant had no

⁴ Ford challenges the weight given to the aggravating circumstances, but does not argue that any of the aggravators do not exist.

⁵ Walker was decided under the "manifestly unreasonable" standard of the previous version of Appellate Rule 7(B).

criminal history and did not harm or threaten the victim. Id. at 538. Ford, on the other hand, has a criminal history, inflicted physical injuries upon Yolanda during the rape, and carried a knife during much of the encounter.⁶ Our supreme court has held that “the simple fact of a criminal history, when taken into consideration with a factor that demonstrates some increased degree of culpability . . . is sufficient to support the decision to impose consecutive sentences.” Bryant, 841 N.E.2d at 1158. Here, the trial court found that Ford had a criminal history and committed the offenses in violation of a protective order, in the presence of his sixteen-year-old daughter, and over the course of ten hours. All of these factors indicate some increased degree of culpability. After due consideration of the trial court’s sentencing decision, we hold that Ford’s seventy-year sentence is not inappropriate given Ford’s character as illuminated by his prior criminal history and by the nature of his offense.

Conclusion

We hold that the evidence of the prior encounters between Ford and Yolanda did not violate Rule 404(b), and that any error in its admission based on Rule 403 did not affect Ford’s substantial rights and therefore constituted harmless error. We also hold that the seventy-year sentence imposed by the trial court was not inappropriate. We affirm Ford’s conviction and sentence.

Affirmed.

SHARPNACK, J., and NAJAM, J., concur.

⁶ Ford argues that Yolanda suffered no physical injury. Appellant's Brief at 23. However, a nurse testified at trial that Yolanda did suffer physical injuries consistent with forced penetration. Tr. at 264-65. Also, Ford's possession of the knife made the threat of more serious violence apparent.